

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

KANSAS EPA LABORATORY, LLC,

Plaintiff,

v.

Case No. 04-2422-CM-DJW

KOLL CONSTRUCTION, L.P., et al.,

Defendants.

**MEMORANDUM AND ORDER**

Pending before the Court is Defendant Koll's Motion to Amend Answer (doc. 141). For the reasons set forth below, Defendant Koll's Motion to Amend Answer will be granted.

**Factual and Procedural Background**

In December 2000, Defendant Koll allegedly entered into a contract to design and build a building for Plaintiff. Thereafter, Defendant Koll allegedly entered into subcontracts with the following entities:

- The Clark Enerson Partnership (architectural and engineering design work);
- Lithko Contracting (construction of the concrete slab and subbase); and
- D.E. Joski Company, Inc. (installation of vinyl flooring).

Koll's subcontractors allegedly completed construction of the building in April 2003.

Also in April 2003 – and for unrelated reasons – Defendant Koll allegedly began winding up all of its business, including shutting down its office in Kansas and its home base in California. Apparently, there were outstanding claims remaining between Plaintiff and Defendant Koll with regard to the building project. On April 22, 2003, Plaintiff and Defendant Koll entered into a Release Agreement with regard to outstanding claims.

On September 8, 2004, Plaintiff filed this lawsuit alleging, among other things, that Defendant Koll defectively designed and/or constructed its building. More specifically, Plaintiff asserts that the vinyl flooring used in the building required significant repair and remediation due to the vinyl flooring having glue and material bubble up through the joints and the flooring becoming loose.

Defendant Koll filed its Answer to Plaintiff's original Complaint on October 26, 2004. Defendant Koll subsequently filed its Answer to Plaintiff's Amended Complaint on August 11, 2005. On February 15, 2006, Defendant Koll requested leave to amend its most recent Answer. More specifically, Defendant Koll seeks to assert affirmative defenses of Release, Accord and/or Satisfaction based on the April 2003 Release Agreement. Plaintiff opposes the motion on grounds that the request is untimely and the proposed amendment is futile.

#### **Applicable Law**

The Federal Rules of Civil Procedure provide that a party may amend his or her pleading once as a matter of course or, after a responsive pleading has been filed, "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."<sup>1</sup> The decision whether to grant leave to amend is within the discretion of the district court.<sup>2</sup> The court may justifiably refuse leave to amend on the grounds of undue delay, bad faith or dilatory motive,

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<sup>1</sup>Fed. R. Civ. P. 15(a).

<sup>2</sup>*Hayes v. Whitman*, 264 F.3d 1017, 1026 (10th Cir. 2001).

repeated failure to cure deficiencies by amendments previously allowed, or futility of the proposed amendment.<sup>3</sup>

### **Analysis**

#### **A. Undue Delay**

Plaintiff opposes Defendant's Motion to Amend on grounds that it is untimely. More specifically, Plaintiff asserts Defendant Koll has had access to the Release Agreement since this lawsuit was filed in September 2004. Plaintiff further asserts there is no justification for Defendant Koll's 17-month delay in seeking leave to add affirmative defenses based on the Release Agreement. The Court disagrees.

Although included within the supplemental Rule 26(a) disclosures produced to Plaintiff, counsel for Defendant Koll avers he only recently discovered the materiality of the Release Agreement through communications with a former employee of Defendant Koll. Counsel asserts that any delay in discovering the materiality of the Release Agreement is justified since Defendant Koll essentially terminated all of its employees prior to Plaintiff filing this lawsuit; thus, there were few witnesses who had knowledge of the existence of this Release.

Moreover, Plaintiff will suffer no prejudice if the Release Agreement is permitted to form the foundation for asserting the proposed affirmative defenses. As a preliminary matter, the Release Agreement currently is the subject of a Motion for Summary Judgment fully briefed and pending before the district court judge. In addition, the Court granted Defendant Koll's unopposed Motion to modify the Scheduling Order, which extended the discovery deadline to July 14, 2006.

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<sup>3</sup>*Foman v. Davis*, 371 U.S. 178, 182 (1962); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

Accordingly, the Court finds that Defendant's delay is justified under the specific circumstances presented and that Plaintiff will not suffer undue prejudice as a result of the amendment.

**B. Futility**

A motion to amend may be denied as futile "if the proposed amendment could not have withstood a motion to dismiss or otherwise failed to state a claim."<sup>4</sup> The court will dismiss a cause of action for failure to state a claim only when "it appears beyond a doubt that [a party] can prove no set of facts in support of his claims which would entitle him to relief,"<sup>5</sup> or when an issue of law is dispositive.<sup>6</sup> The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiff.<sup>7</sup> The issue in resolving such a motion is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims."<sup>8</sup>

Plaintiff acknowledges the Release Agreement was intended to mutually discharge the parties from liability for certain claims. Plaintiff disputes, however, that the flooring claim was included within the Release Agreement and instead argues the claim was preserved under general language within the Agreement applicable to warranty of the work performed.

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<sup>4</sup>*Schepp v. Fremont Cty.*, 900 F.2d 1448, 1451 (10th Cir. 1990)

<sup>5</sup>*Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

<sup>6</sup>*Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

<sup>7</sup>*Beedle*, 422 F.3d at 1063.

<sup>8</sup>*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quotation omitted); *accord Beedle*, 422 F.3d at 1063.

Conversely, Defendant Koll argues the flooring claim was included within the Release Agreement because Plaintiff's claim that the vinyl flooring was defective existed prior to execution of the Release Agreement.

Given these circumstances, and viewing the evidence presented in a light most favorable to Defendant Koll, the Court finds there are facts that can be proven by Defendant Koll which would entitle it to relief under the affirmative defenses of Release, Accord and/or Satisfaction. Accordingly, Defendant Koll's Motion (doc. 141) is granted and the referenced Amended Answer shall be electronically filed and served no later than **May 24, 2006**.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 16th day of May, 2006.

s/ David J. Waxse  
David J. Waxse  
United States Magistrate Judge

cc: All counsel and *pro se* parties